(39634)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 778

In the Matter of SAMUEL WINSHIP, *Appellant*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## BRIEF FOR APPELLEE

J. LEE RANKIN,
*Corporation Counsel of the City of New York,*
*Attorney for Appellee,*
Municipal Building,
New York, N. Y. 10007.

STANLEY BUCHSBAUM,
VINCENT J. SYRACUSE,
*of Counsel.*

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### Question Presented for Review

The question presented, as stated by appellant, is essentially accurate.[1] This question raises, we suggest, the following possible basic constitutional issues:

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[1] The statement that the boy was "facing a six-year confinement," however, tends to distort the actual situation. The New York Family Court Act, §758(c), provides that no commitment may exceed three years. Under the Rules of the Family Court, Rule 7.7, a commitment shall be for an indefinite term not exceeding three years.

The docket for this proceeding (File No. 797) shows that the matter was discharged to File No. 798. On April 13, 1967, appellant was placed in a training school. The file reveals that he was placed on "parole" [evidently meaning probation] on February 20, 1968, and that, after living with his parents, he "absconded" on August 2, 1968. Apparently he was found thereafter and, on October 7, 1968, the docket shows that the commitment was extended for one year as of October 13, 1968. The docket does not reveal any other extensions of the commitment.

1. Does any involuntary confinement imposed by a state require the availability of all the protections available to a defendant in a criminal proceeding?

2. If the answer is in the negative, must all such protections, nevertheless, be made available in New York juvenile proceedings on the basis of a conclusion that they are actually criminal trials?

The first issue would appear to relate only to due process. The second is a basic issue with respect to both the due process and the equal protection arguments advanced by the appellant.

## Statement of the Case

Because we believe that the appellant's recital of the facts is in some respects inadequate, we shall restate them.

### Petitioner's Case

*Rae Goldman,* the petitioner in the Family Court, testified that she is a sales person in a furniture store at 2436 Grand Concourse in the Bronx (4-5, 6).[2] On March 28, 1967, at 6:15 p.m., a co-worker informed her that the door to the bathroom was locked (5). They waited to see who would come out (5). After a minute or two, the appellant ran out (5). Mrs. Goldman ran to the locker room, which adjoins the bathroom (5). Her bag, which she had placed in an unlocked locker in the room at 5:30 p.m., was gone (5, 8, 10). It was found on the bathroom floor, its contents scattered (6). Missing from the bag was petitioner's money, $112 (6).

No customers had been in the store during the 45-minute period between the time she placed the bag in her

[2] Unless otherwise noted, references are to the Appendix.

locker and the time the boy ran out (7, 9). The only people in the store were two girls who were co-workers (7). The only access to the store was from the front (8). She did not see the boy come into the store (8, 10).

Mrs. Goldman saw the boy run out of the bathroom and out into the street (5, 7). It was still daylight and the door was well lit (7). As he quickly ran the twenty feet from the bathroom to the doorway, she saw him for about ten seconds, including the profile of his face (10). She observed that he was wearing a coat with a fur collar, a cap and his glasses (10).

On at least six prior occasions she had seen this little boy, "a number of times sneaking around and prowling around the store," and she had threatened to call a policeman to get him out (6, 7, 20). He always had a little shoe box with him, and he had once shined her shoes in the store (7). When she was asked whether it was possible that she had made a mistake in identification, she replied (21):

> "No. I know the scar on his face. I know that little boy. I couldn't miss him any place."

When Mrs. Goldman found that the money was missing, she called the police station and described the boy (20). At the trial she recalled having described him as a little boy between 12 and 14 years of age, "under five feet five, round face, dark coloring and wearing glasses and I described his clothes" (20). [A police officer recalled the description given by her, as entered on the police report, as including glasses, a leather cap, fur collar and that the child was under five feet (21).] Actually, the boy was 12½ years old and about four feet, nine inches tall (9).

On the night after the incident Mrs. Goldman was called by the police and told that they had picked up a

boy who answered her description (20). She went to the police station and identified him (6).

Patrolman *Clarke,* whose testimony concerning the description has already been described, testified that at about 8:40 p.m. on March 29, 1967, he found the appellant trespassing in the rear of a bakery on East Fordham Road, about three and a half blocks from the furniture store where Mrs. Goldman works (22, 24). The boy had a shoe shine kit (23). He had two rolls of dimes, totaling $10, in his pocket, but this was not money taken from Mrs. Goldman (23-24). When the boy was picked up, it was not because of the description given by Mrs. Goldman (22). The patrolman also testified that the residence of the appellant was about a 15 minute bus ride from the furniture store (22).

**Appellant's Case**

*Ethel Winship,* appellant's mother, testified that, after returning from a morning trip to the zoo, her son left the house at about 3:00 or 4:00 o'clock on March 28, 1967, to go bicycle riding with his sister (11). He returned a little after 5:00 p.m., and they had dinner at 6:00 p.m. (11). In the evening he watched television with his father (11). At no time did he leave the house after returning from bicycle riding (11). It was impossible for him to leave the house without being seen (12).

The witness acknowledged that appellant did shine shoes (13).

*Melvin Coleman,* Mrs. Winship's brother, testified that he was in his sister's house on March 28, 1967, and did not leave it all day (15). He said that the appellant returned to the house from bicycle riding at 3:30 p.m. and that they had dinner at 6 p.m. (15, 16). When he was asked what

day of the week he was talking about, he first said he did not remember and then said he thought it was a Wednesday (15). Only after he was informed that it was a Tuesday did he testify that the day the boy went to the zoo was a Tuesday (15-16).

He said that he had eaten dinner at his sister's house together with Samuel every day of the week involved (16), but, after the policeman testified that the boy had been apprehended on Wednesday evening, he recalled that he had not eaten there on Wednesday (26). [It should be noted that this testimony was being given on Thursday of the same week.]

*Samuel Winship,* the appellant, testified that he went to the zoo with his mother and sister on March 28th (17). Afterwards he went bicycle riding with his sister until his mother called him upstairs to get ready to eat (17-18). It was still daytime (18). After dinner he watched TV (18). He went to sleep at about a quarter to 8 (18).

Appellant denied that he had ever shined Mrs. Goldman's shoes or seen her before she came to the police station (18, 19). He also insisted that he did not know the store and had never been in it (18, 19). He acknowledged that he wore a leather cap (13).

**Decision of the Family Court**

Following the conclusion of the case, the Court orally analyzed the testimony. The judge stated that the issue came down to a question of credibility (26). He noted the boy's obvious self interest and remarked that a mother and uncle might lie in an attempt to establish an alibi for a boy they loved (26-27). He saw no reason why Mrs. Goldman should lie or seek to punish an innocent boy (27). He said that he thought that Mrs. Goldman knew the boy very well,

pointing out that she knew about his shoe shining activity and about his hat (27).

After the Law Guardian added to her other arguments one about the $112 not having been found, he made his finding, as follows (27):

> "After both sides rest, the petition is found to be proved by a preponderance of the evidence. The testimony and description of the petitioner was very accurate and the demeanor of the petitioner impressed the Court and her previous knowledge of the boy did as well. That is a finding. If I'm wrong, I'm wrong."

The Law Guardian then argued that the finding violated the boy's equal protection rights because, if he were 16, he would have to be found guilty beyond a reasonable doubt (27). She pointed out that the judge was making a finding on the preponderance of the evidence, and he replied (28): "Well, it convinces me." When she said that it was not beyond a reasonable doubt, the judge said (28):

> "That is true. I'm convinced of the facts alleged. Our statute says a preponderance and a preponderance it is. That is the only difference between children and grownups that I can see. I don't think it's an unfair difference at all."

Later, in the course of a general discussion of the validity of the quantum proof distinction, there was the following colloquy (29):

> "Mrs. Rosenberg: No finding is certain.
>
> The Court: No, not certain as a finding of an adult court because the rule is different. Somebody may not take my finding to be a solid basis as an adult finding because it's not made on the same basis, but then there are hundreds of ordinary Civil Court Judg-

ments for money and sometimes for huge amounts made on the preponderance of the evidence by juries and judges alike and injunctions are made and divorces are given. Adultery is found on the basis of preponderance. This boy's life won't be hurt by my finding. The question is if it's true.

Mrs. Rosenberg: He may be hurt.

The Court: Yes.

Mrs. Rosenberg: He's subject to training school for this finding.

The Court: Well, it would have to be a lot more than this finding before he ever gets taken away from his mother. Let's have the probation report. I must say or get on that your argument is very, very well put, but it does not prevail today."

## Summary of Argument

The issue of whether due process is denied by a juvenile delinquency proceeding in which the decision with regard to the commission of the wrongful act is based on the preponderance of the evidence was not decided by this Court in *Matter of Gault*, 387 U.S. 1 (1967). To hold that the proof beyond a reasonable doubt standard must be used would appear to require either a conclusion that the New York juvenile proceedings are essentially equivalent to a criminal trial or that any proceeding which may lead to a person being confined must be decided on the basis of such a standard of proof.

The New York juvenile proceedings are far different from ordinary criminal proceedings. While no juvenile court has come close to achieving the aims of those who originated such courts, the New York court is one of the best of such courts. Its procedures comply with normal

due process requirements and include most, if not all, of what are generally regarded as desirable features. It has been continually studied and upgraded.

A determination that the New York law unconstitutionally denies due process because it does not provide for use of the reasonable doubt standard probably would not have a serious impact if all that resulted would be a change in the quantum of proof. A determination on the ground of equivalency to criminal trials, however, might almost automatically require the use of juries. This would substantially alter the nature of juvenile proceedings in an undesirable manner. It would greatly reduce their present secrecy. Such a determination might also require similar changes in "persons in need of supervision" proceedings.

A ruling that in any proceeding which may result in a person losing his liberty the use of the reasonable doubt standard is required would be far ranging in its effect. In addition to juvenile delinquency proceedings, it might be applicable to "persons in need of supervision" and to neglected children since, under certain circumstances, they may be compulsorily removed from the home of their parents. It would also affect proceedings to commit insane persons, chronic alcoholics, sexual psychopaths and narcotic addicts. In addition, it apparently would apply to civil contempt proceedings.

It is not a denial of equal protection of the laws to have a standard of proof for juvenile delinquency proceedings different from that for adult criminal trials or "youthful offender" criminal trials. There are many rational bases for the distinction.

## POINT I

**The inclusion in the New York Family Court Act of a provision that the determination at the conclusion of a fact-finding hearing in a juvenile delinquency proceeding must be based on a preponderance of the evidence does not constitute a denial of due process of law.**

**a. The *Gault* and *Kent* cases.**

**(1)**

In view of the appellant's great reliance on *Matter of Gault*, 387 U.S. 1 (1967), it seems appropriate first to review exactly what was decided in that case. The nature of the *Gault* case was aptly and succinctly stated by Judge Bergan in his opinion for the majority in the present case. He said (43):

> "In *Gault* there was an absence of elemental fairness. The complainant was not sworn and did not appear in court; there was no adequate notice of the proceedings given to the parents; there was no counsel or offer of counsel; no record was made of proceedings; there was no right of appeal or review; and the juvenile court Judge, explaining his action, seemed to have a somewhat vague notion of the alternative open to him (387 U.S. 1, 28-29)."

Analysis of the lengthy and thoughtful majority opinion of this Court in *Gault* makes one thing clear. Great care was taken not to prejudge issues which were not deemed vital to the decision being made.[3]

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[3] Mr. Justice White and Mr. Justice Harlan, however, concluded that some of the issues decided were not essential to the determination (pp. 64-65, 72-73).

The Court deliberately refused to consider the issue raised by the present case—the quantum of proof—although that issue had been considered by the Arizona Supreme Court. Justice Fortas said (pp. 10-11):

> "We shall not consider other issues which were passed upon by the Supreme Court of Arizona. We emphasize that we indicate no opinion as to whether the decision of that court with respect to such other issues does or does not conflict with requirements of the Federal Constitution."

Although the opinion discusses actual and claimed deficiencies in the juvenile delinquency process and notes the extent to which it resembles a criminal case, it appears to have been written with a planned effort to avoid a conclusion that either the resemblances to a criminal case or the fact that children are deprived of their liberty requires that a child involved in a juvenile delinquency proceeding must be provided with all the rights and protections accorded to an adult in a criminal case.

Certain essential ingredients of due process, it was held, must be afforded the juvenile. These include the right to adequate notice of the charges, counsel, confrontation and cross-examination and the privilege against self-incrimination. Immediately before his discussion of these specifications, Mr. Justice Fortas referred to *Kent* v. *United States*, 383 U.S. 541 (1966), and quoted the following sentence from page 562 of that opinion (387 U.S. at p. 30):

> "We do not mean . . . to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."

In the next sentence of the *Gault* opinion he stated that this view was being reiterated.

Elsewhere in the opinion emphasis was placed on due process requirements applicable to both civil and criminal proceedings. Thus, in dealing with the question of notice, it was said (p. 33):

> "Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding."

With respect to self-incrimination, it was emphasized that the privilege may be claimed in a civil or administrative proceeding if the statement is or may be inculpatory (p. 49). It is then that the opinion made the only statement, as far as we can find, that treats a juvenile delinquency proceeding as though it were criminal in nature. It states that juvenile proceedings to determine "delinquency" which may lead to a commitment in a state institution must be regarded as "criminal" for purposes of self-incrimination (p. 49). It notes that in more than half of the states a juvenile may be placed or transferred to adult penal institutions.

Even this narrowly limited statement with regard to self-incrimination was not essential to the decision of this Court. This can be seen from the next paragraph of the opinion. There it is pointed out that in Arizona, as in most states, provision is made for juvenile courts to relinquish or waive jurisdiction to the ordinary criminal courts. Obviously, this ground alone could have been sufficient basis for deciding that the privilege against self-incrimination was applicable. [We call attention to the fact that in New York, unlike Arizona and many other states, there is no such provision for relinquishment or waiver to the criminal courts.]

**(2)**

Although *Kent* v. *United States,* 383 U.S. 541 (1966), was decided on grounds of statutory construction, the opinion has constitutional overtones. It held that a waiver of jurisdiction by the juvenile court so that the case could be tried in a criminal court is a matter of such importance that it must be preceded by a hearing. In such a proceeding, it was decided, the child is entitled to counsel and, through counsel, access to the social records and probation or similar reports which may be considered by the court in making its decision on waiver. He is also entitled to a statement of reasons for the juvenile court's decision.

We have already quoted the statement, reiterated in *Gault,* to the effect that the hearing need not conform with all requirements of a criminal trial or even of the usual administrative hearing, but that it must meet the essentials of due process and fair treatment (*ante,* p. 10). This Court also stated (383 U.S. at p. 556):

> "This concern, however, does not induce us in this case to accept the invitation to rule that constitutional guarantees which would be applicable to adults charged with serious offenses must be applied in juvenile proceedings concerned with allegations of law violation."

**(3)**

Our view concerning the nature of *Gault* and *Kent* is in accord with that of most of the state courts which have dealt with the issue of quantum of evidence or related issues subsequent to the decisions in those cases. *In re M,* 70 Cal. 2d ——, 75 Cal. Rptr. 1, 450 P. 2d 296 (1969); *State* v. *Santana,* —— Tex. ——, 444 S.W. 2d 614 (1969); *In re Wylie,* 231 A. 2d 81 (D.C. App., 1967); *In re Ellis,* 253 A. 2d 789 (D.C. App., 1969); *State* v. *Arenas,* —— Ore.

—, 453 P. 2d 915 (1969). *Cf. In re Agler,* 19 Ohio St. 2d 70, 249 N.E. 2d 808 (1969) (where the Court held that "clear and convincing evidence" was required); *In re Burrus,* — N.C. —, 169 S.E. 2d 879 (1969); *Commonwealth* v. *Johnson,* 211 Pa. Super. 62, 234 A. 2d 9 (1967) (holding that *Kent* and *Gault* do not require a state to afford a juvenile full criminal due process). We call particular attention to the well reasoned opinions by the California and the Texas courts.

*In re Urbasek,* 38 Ill. 2d 535, 232 N.E. 2d 716 (1968), held, upon the basis of the recurrent theme of the majority opinion in *Gault* (232 N.E. 2d at p. 719), that proof beyond a reasonable doubt is constitutionally required. And *United States* v. *Costanzo,* 395 F. 2d 441, 443-445 (4th Cir. 1968), has reasoned dictum to the same effect. In *De Backer* v. *Brainard,* 183 Neb. 461, 161 N.W. 2d 508 (1968), app. dism. 38 U.S. Law Week 4001 (Nov. 12, 1969), four of the seven judges would have followed *Urbasek* and required proof beyond a reasonable doubt, but the Nebraska constitution bars a declaration that a statute is unconstitutional except by the concurrence of five judges. Cf. *Nieves* v. *United States,* 280 F. Supp. 994 (S.D.N.Y., 1968).

The writers of articles in law reviews and sociological journals are divided on this question. It should be noted that some of them, in supporting the view that a reasonable doubt standard should be required, fail to draw the distinction between constitutional compulsion of the use of such a standard and the mere desirability of such a legislative mandate.

At this point it is appropriate to deal with appellant's statement that the trend of authoritative commentary favors the reasonable doubt standard (App. Br., p. 24). The Children's Bureau's *Legislative Guide for Drafting*

*Family and Juvenile Court Acts* (1969) and the *Uniform Juvenile Court Act* prepared by the National Conference of Commissioners on Uniform State Laws, which it follows, are both suggestions for legislation. The statement that the American Bar Association has endorsed the reasonable doubt standard appears to be erroneous. It seems to be based on the publication of an article written by two authors in the ABA Family Law Quarterly. That periodical contains a disclaimer note in each issue, reading as follows:

> "The material contained herein represents the opinion of the authors, and shall not be construed to be the action of the American Bar Association or the Section of Family Law unless adopted pursuant to the By-Laws of the Association and the Section."

There is no suggestion by appellant that the article has been so adopted.

The *Model Rules for Juvenile Courts* (1969) prepared by the Council of Judges of the National Council on Crime and Delinquency propose a "clear and convincing" evidence standard. It is plain that this is a legislative proposal and not a conclusion based on constitutional law, as can be seen from the commentary on Rule 26 (p. 57).

A similar suggestion contained in a task force report of the President's Commission on Law Enforcement and Administration of Justice is not, despite appellant's statement to the contrary, the view of the President's Commission or of the task force. This suggestion is contained in a paper prepared by Professor Lemart and published as Appendix D of the *Task Force Report: Juvenile Delinquency and Youth Crime*,[4] pp. 91, 103. The foreword to

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[4] Hereafter cited as "Task Force Report."

this task force report clearly states the appendices are merely papers submitted to the Commission by consultants.

Indeed, the Task Force Report concluded (at p. 40) that: "Some elements of the criminal trial, including jury trial, a standard of proof beyond a reasonable doubt, a wholly open and public trial, and a rigid insistence on the privilege against self-incrimination in all its aspects, are not here regarded as so essential to procedural justice as to warrant the risks their use would entail for the integrity of the juvenile court."

**b. The basic issue.**

Broadly stated, the basic issue is whether due process requires that the conduct upon which a determination of juvenile delinquency rests must be proved beyond a reasonable doubt. The issue may, perhaps, be narrowed to hinge the determination on the nature of a particular state's juvenile proceeding and its treatment of juvenile delinquents.

Ordinarily, of course, due process does not call for proof beyond a reasonable doubt. Normally such a quantum of proof is required only in criminal trials or in proceedings which are criminal in nature. While, as we shall show later, it has never been squarely held by this Court that due process compels such a measure of proof in criminal cases, we shall assume that it does in making almost all of our argument.

There would appear to be only two bases on which it could be held that proof beyond a reasonable doubt is essential in a juvenile proceeding. One is that such proceedings in all instances or, by reason of their nature, in in some states so closely resemble a criminal proceeding that it is improper for a state to treat them as different

from a trial of an adult for the commission of a crime. (The argument advanced by the appellant that it is a denial of equal protection to apply a standard of proof to juveniles different from that afforded to adults or older adolescents is merely the due process argument in equal protection trappings.) The only other basis we can conceive of for requiring the reasonable doubt standard is a conclusion that such a measure of proof is a due process requirement in any legal proceeding which may lead to a loss of liberty.

We do not believe that the Constitution imposes such a requirement on either ground. It may be concluded that it would be desirable to have such a standard of proof in delinquency proceeding, but that should be decided by the legislatures. This Court, of course, will reject the assumption of some writers on this subject that whatever is desirable is automatically a constitutional requirement.

**c. New York juvenile proceedings are not criminal proceedings.**

**(1)**

We shall not attempt to review the aims and aspirations of the juvenile court or its history. That has been adequately described by Mr. Justice Fortas in *Kent* and *Gault* and by the numerous articles cited in those opinions. There seems little doubt that, if the court had fulfilled the dreams and hopes of its innovators, the issue presently before the Court would not have been regarded seriously. If the juvenile court in its ideal form were merely a disguised criminal court, it would be incredible that the courts of forty states would have upheld its constitutionality. Paulsen, *Kent* v. *United States*: *The Constitutional Context of Juvenile Cases,* 1966 Supreme Court Review 167, 174-175. See, also, *Pee* v. *United States,* 274 F. 2d 556, 561 *et seq.* (D.C. Cir., 1959).

The critical question appears to be, as aptly stated in *Kent*, "whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults" (383 U.S. at p. 555). It is tragic that so noble an experiment has thus far fallen so short of its goal. Despite universal adoption of the juvenile court in this country, it cannot reasonably be claimed that it has met its goals in even a single state. Yet few, if any, of its critics are ready to suggest that it has failed to the point that it should be abandoned. See the report of the President's Commission on Law Enforcement and Justice, *The Challenge of Crime in a Free Society* (1967), p. 81.

Those who have studied the court offer varied reasons for its limited success aside from inadequate knowledge of the cause of and the cure for what is generally regarded as wrongful conduct. Some, such as the inadequacy of funds given the court, the caliber of some of the juvenile court judges and the deficiencies of treatment and of places of confinement, apply to New York, but to a lesser degree than in most states. Others, such as the setting up of a court which is a criminal court except in name and procedures and the failure to attempt to make reforms as time and experience reveal their need, cannot, we submit, be ascribed to New York.

Since the inception of the juvenile court in New York, it has been repeatedly studied and, as a result, its nature and procedures have been revised from time to time. Only a little more than seven years ago, as a result of a comprehensive study, substantial changes were made (N.Y. Laws 1962, chs. 686-691). Subsequently a number of other changes were adopted, as can be seen in the pocket part

of McKinney's Consolidated Laws of New York, Book 29-A, Part 1, Judiciary—Court Acts, Family Court. Earlier this year more Family Court judges were provided. See *N.Y. Judicial Conference—14th Annual Report* (1969), p. 244.

Despite these efforts much remains to be done. We suggest, however, that, in light of the nature of the court in New York, its procedures and the manner in which those who are found to be juvenile delinquents are subsequently dealt with, it cannot reasonably be held that performance in New York has fallen so short of the theoretical purpose of the court as to require that it be treated as a criminal court so as to make applicable all of the constitutional guarantees available to adults.

**(2)**

Unless it is held that due process requires proof beyond a reasonable doubt in every proceeding which may result in an individual losing his liberty, it would seem that the issue is not a generalized one. It is the specific one of whether the quantum of proof standard of the New York law unconstitutionally deprives children found to be juvenile delinquents under it of due process. The question is not whether another juvenile court's procedure or the procedures of most of the states' juvenile courts violate due process. It is whether the juvenile court in New York, its procedures and its operation are such that, despite its label, it is in effect a criminal court.

We need not remind this Court that those who attack the constitutionality of a statute must bear the burden of overcoming the presumption of constitutionality. That burden is not met by showing flaws in juvenile courts of other

states; nor is it met by citing articles or governmental studies which recite deficiencies of juvenile courts without specifying whether such criticism applies to the New York courts.

The New York court has probation and auxiliary services (Family Court Act, §§ 252, 253). In proceedings to determine juvenile delinquency or whether a child is a person in need of supervision or is a neglected child, the minor has a right to counsel of his own choosing or of a governmentally paid law guardian (Family Court Act, §§ 241-249). In the 1967-68 period there was such legal representation in 98% of the proceedings in New York City and in 51% elsewhere in the state (*N.Y. Judicial Conference-14th Annual Report*, p. 274). There is an intake service which attempts to adjust, among others, juvenile cases without formal judicial proceedings (*id.*, p. 272; Family Court Act, § 734).

The governing statute requires the giving of adequate notice of the charges (Family Court Act, §§ 736, 737). The child and his parent must be notified of the right to remain silent and to be represented by his own counsel or a law guardian (*id.*, §§ 728, 741). Statements made during a preliminary conference are not admissible at a fact-finding hearing (*id.*, § 735).

While the statute does not expressly require confrontation or confer the right of cross-examination, it has consistently been treated as conferring these rights. At the fact-finding hearing to determine whether the juvenile did the acts alleged in the petition, the only evidence admissible is that which is "competent, material and relevant" (*id.*, §§ 742, 744). For the purpose of determining whether the child did such acts, an uncorroborated confession made out of court by him is not sufficient (*id.*, § 744). When an order

is made finding that a child is a juvenile delinquent, the court must state the grounds for the finding (*id.*, § 752).

Provision is made for an unusually speedy hearing. Before the petition is filed no child may be detained more than forty-eight hours without a hearing to make a preliminary determination of whether the court appears to have jurisdiction and, if so, whether the child should be detained (*id.*, § 729). He is detained only if there is a substantial probability that he will not appear in court or if there is a serious risk that he may, before the return date, do an act which if committed by an adult would be a crime (*id.*, § 728). If he is detained, the fact-finding hearing must commence not more than three days after the petition is filed (*id.*, § 747). Unless on request by the juvenile, the hearing may not be adjourned for more than three days except when the petition alleges a homicide or an assault on a person incapacitated from attending court as a result thereof, in which instances the court may adjourn the hearing for a reasonable length of time (*id.*, § 748). On request by the juvenile or his representative for good cause, the hearing may be adjourned for a reasonable period of time (*ibid*). Successive motions to adjourn may be granted only in special circumstances (*ibid*).

The dispositional hearing, to determine whether the juvenile requires supervision, treatment or confinement, is separate from the fact-finding hearing (*id.*, § 743). It may commence immediately after the fact-finding hearing unless adjourned; and adjournments, if the child is detained, may not exceed two ten day adjournments (*id.*, §§ 746, 749). Only material and relevant evidence may be admitted (*id.*, § 745). Reports of the probation service for use in making an order of disposition are not furnished to the court prior to the completion of the fact-finding hearing; the reports are deemed confidential, but the court may disclose them,

in whole or in part, to "the law guardian, counsel, party in interest or other appropriate person" [*id.*, § 746(b)].

An adjudication at the conclusion of a dispositional hearing must be based on a preponderance of evidence [*id.*, § 745(b)]. Even after an adverse fact-finding determination, the proceeding may be dismissed at the dispositional hearing without an adjudication of delinquency if it is found that there is no need for supervision, treatment or confinement. *Matter of Ronny*, 40 Misc. 2d 194, 197, 242 N.Y.S. 2d 844 (1963); Family Court Act, §§ 731, 743, 751. Nor does an adjudication of delinquency necessarily lead to a commitment. It may result in a suspended judgment, probation or a placement other than a commitment (Family Court Act, § 753).

Upon an adjudication of delinquency a child may be committed only to the care and custody of an institution "suitable for the commitment of a delinquent child" maintained by the state or one of its subdivisions, to a commissioner of public welfare or to an authorized agency except, in some situations, when he is 15 years of age at the time of the commission of the wrongful act [*id.*, § 758(a)]. The exception is not applicable to the case at bar since the child involved was only about 12½ years old at the time. The exception for those 15 or older applies only where the act committed by them would have, if committed by an adult, been a class A or class B felony under the New York Penal Law. Even where this exception applies the commitment for boys may, but need not, be to a single specified reformatory, and for girls there is a similar limitation to a suitable institution [*id.*, § 758(b)]. The reformatory to which such boys may be committed is the Elmira Reception Center, which is otherwise limited to males between the ages of 16 and 21 (N.Y. Correction Law, §§ 60, 61).

No commitment may exceed three years [Family Court Act, § 758(c)].[5] The Rules of the Family Court provide that such a commitment shall be for an indefinite term which shall not exceed three years (Rule 7.7). It may be of some interest to note that, of all the boys adjudged delinquents in 1967-68, 73% had judgment suspended, were discharged with a warning, or were placed on probation; only 14% were specifically committed to a state training school, which may have been increased by some of the 8% who were discharged to another petition, as in the present case (*N.Y. Judicial Conference-14th Annual Report,* p. 267). The statistics with regard to girls show an even lesser percentage of commitment (*ibid*).

The statute provides for motions to modify any order or to terminate commitment (Family Court Act, §§ 762, 764-768). As is obvious from the present case, stenographic minutes of hearings are taken and the right to appeal is provided (*id.*, § 1011). Various sections provide that no adjudication shall be denominated a conviction and no juvenile delinquent shall be denominated a criminal; that no adjudication shall deprive a person of any right or privilege or disqualify him from holding office or receiving any license; and strictly limit the use of court or police records (*id.*, §§ 781-784).

The New York law, unlike that in most other jurisdictions, does not provide for any waiver to a criminal court.

The New York law was mentioned a number of times in the *Gault* opinion, almost always with an indication that its features were desirable (387 U.S. at pp. 11, 12, 24, 37, 40, 41, 46, 48, 52, 55, 57). This is also true of the *Task Force Report* (pp. 11, 15, 21, 23, 26, 28, 29, 33-38, 40).

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[5] Although it is not clear from the statute, apparently the period of commitment can be extended for a year at a time until a boy is 18 years old.

(3)

The appellant asserts that the privilege against self-incrimination is "severely diluted where the standard of proof is so low that a finding of guilt is virtually assured, should the juvenile elect to remain silent after only a *prima facie* case has been adduced" (Br., p. 23). This would appear to be mere conjecture. We are aware of no factual study that supports this hypothesis. It is likely that this would occur in a jury trial. It is, at most, a mere possibility in a trial before an experienced Family Court judge. And the statistics of the Family Court furnish a fairly strong indication that it does not occur in New York.

New York did not wait for the *Gault* decision before giving a child involved in a juvenile delinquency proceeding the right to remain silent. This right has been available since 1962 [Family Court Act, § 741(a)], and, since juveniles are usually represented by counsel, it must have been exercised often. In the 1967-68 year, 14,302 juvenile delinquency petitions were reported disposed of (*Judicial Conference-14th Annual Report,* p. 261). Almost half of these cases were terminated without an adjudication of delinquency for a variety of reasons and, significantly, 74% of these were so terminated because of a failure of proof (*id.,* p. 267). The disposition of well over one-third of the juvenile delinquency proceedings which reach the hearing stage by a finding of failure of proof do not square with appellant's conjecture that a finding of guilt is virtually assured once a *prima facie* case has been adduced where the juvenile remains silent. In view of the intake screening procedure, which in New York City alone disposed of 8,845 juvenile cases without formal referral to the court, it seems unlikely that it was impossible to make out a *prima facie* case in a great many of the hearings. The failure of proof must have been a failure to convince the Court, whether or not the juvenile testified.

(4)

The appellant and amicus point out that the secrecy of juvenile proceedings is not complete and that a finding of juvenile delinquency stigmatizes the child. Amicus details the extent of disclosure in the District of Columbia (Br., pp. 36-39), but neither of their briefs provide much to show the extent that this also occurs in New York. The efforts to maintain secrecy are substantial.

The governing statute authorizes the exclusion of the general public and the admission of only those who have a direct interest in the case (Family Court Act, § 741). As a matter of practice this is generally done, and those who are permitted to observe such hearings are usually required to agree not to reveal the name of the child involved.

Records of the Family Court may not be inspected except by permission of the court (*id.*, § 166). Police records relating to the arrest and disposition of any person involved in a juvenile delinquency proceeding are kept in separate files and are withheld from public inspection; they may be inspected upon good cause shown by a parent, guardian, next friend or attorney of the person upon the written order of a Family Court judge or, if the person is convicted of a crime, by a judge of the court in which he is convicted (*id.*, § 784).

Other efforts to maintain secrecy include the general practice of counsel to limit the title of a case on appeal and references in the briefs to the first name and the initial of the surname.[6] Although the full name is used in

[6] In the present case this was done in the New York courts (see, e.g., Appendix, pp. 36, 37, 38). Apparently, in the course of taking the appeal to this Court counsel for the appellant inadvertently failed to make sure that the anonymity continued. It is respectfully suggested that this practice be followed in any opinion of this Court.

the record, normally this is not available to the public because a printed record on appeal is not required (*id.*, § 1016) and the practice has been to use the Court's original record. In addition, the fact that a person was before the Family Court for a juvenile delinquency proceeding hearing and any confession, admission or statement made by him to the Court or any officer thereof in any stage of the proceeding is inadmissible as evidence against him or his interest in any other court; except that, in imposing sentence on an adult after conviction, another court may receive and consider such records (*id.*, § 783).

The secrecy which veils such a delinquency proceeding, even though it may not be entirely complete, differs completely from what occurs with respect to criminal cases. The contrast is most vivid when a newsworthy crime is solved and the captured perpetrators include adults and juveniles. The newspapers describe the juvenile by age and sex; the adults are named, their addresses given, often their pictures are printed and frequently many details of their lives are revealed. When the adult is tried, this is repeated in many instances. When the juvenile has his hearings, there is rarely, if ever, a mention of it in the press. Almost as great is the difference between the disabilities of and the prejudice against the adult criminal, the "ex-con," and the juvenile delinquent.

**(5)**

The appellant states, at page 23 of his brief, that a delinquency finding may preclude subsequent civil service employment, citing *Strong* v. *Kennedy*, 29 Misc 2d 54, 210 N.Y.S. 2d 588 (Sup.Ct., N.Y.Co., 1961). But the statement is directly contrary to the holding in that case. The Court, in ruling that a juvenile delinquency adjudication could not be the basis for denying a person a civil service position, referred to Family Court Act, Section 782.

**(6)**

The brief of amicus, at page 13, states that most courts are noting the necessity for according the same safeguards to juveniles and adults. It then asserts that: "Until the instant case, the authority in New York was to this effect." And, in a footnote to the quoted sentence, it cites and quotes from several New York cases which stated that proof beyond a reasonable doubt must be established.

In *People* v. *Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932), cert. den., 289 U.S. 709 (1933), the New York Court of Appeals said (p. 178):

> "The finding of fact must rest on the preponderance of the evidence adduced under those rules."

The opinion distinguished and explained *People* v. *Fitzgerald*, 244 N. Y. 307, 155 N.E. 584 (1927), which was decided under a different statute. See, also, GOLDSMITH, *Legal Evidence in the New York Children's Court*, 3 Brooklyn Law Review 24 (1933) at pp. 30 *et seq.*

*Matter of Madik*, 233 App. Div. 12, 251 N.Y.Supp. 765 (1931), preceded the *Lewis* case and was in effect overruled by it. *People* v. *Anonymous*, 53 Misc 2d 690, 279 N.Y.S. 2d 540 (1967), was not a juvenile delinquency proceeding. It was a proceeding under the "Youthful Offender" law (N.Y. Code of Criminal Procedure, §§ 913e-913r). That law applies to certain minors betwen the ages of 16 and 19 (id., § 913e), and it is governed, in large part, by the New York Penal Law (id., §§ 913-m, 913-q).

*In re James Rich*, 86 N.Y.S. 2d 308 (1949, *not officially reported*), contains a statement by a Children's Court judge which is inconsistent with the opinion of the New York Court of Appeals in the *Lewis* case, quoted above.

All of these cases, aside from the "youthful offender" case, were decided prior to the enactment of the Family Court Act in 1962, which specifically provides for the preponderance of evidence standard [§ 744(b)].

The fact that the reasonable doubt rule is related to what appellant calls the "integrity of the fact-finding process" (App. Br., p. 14), establishes neither its constitutional status nor its applicability to delinquency cases. Rules of relevancy, materiality, competency and hearsay are all intended to assure a reliable verdict. Yet they are not ordinarily thought of as giving rise to constitutional questions. See e.g., *Stein* v. *New York*, 346 U.S. 156, 196 (1953); *Mobile, J. & K.C. R.R.* v. *Turnispeed*, 219 U.S. 35, 43 (1910).

(7)

Amicus points out that a juvenile may be committed for a longer time than an adult who commits the same act (Br., p. 19). This is true in some instances. On the other hand, the commitment of a juvenile is often far shorter than that of adults. The most striking example, of course, is an act which, if committed by an adult, would constitute murder. A provision in the New York law which permitted a criminal court to try a person over 15 years of age for murder (Family Court Act, § 715) has been repealed (N.Y. Laws 1967, ch. 680, § 87).

Amicus also quotes at length from an opinion of a Rhode Island juvenile court judge (Amicus Br., pp. 29-30). The attitude of this judge is best illustrated by the following excerpts from his opinion:

> "* * * Let's face it, murder is murder; robbery is robbery; they are both criminal offenses, not civil, regardless and independent of the age of the doer. * * *

> * * * Let us not deal with a criminal matter in a civil way, with the result that we have a 'hodge podge' of nothingness."

An answer to such an attitude is well stated in the following quotation:

> "Another aspect of current thinking is a movement toward absolutism the world over * * * the movement * * * may easily be carried so far with mistaken zeal that * * * the juvenile courts in reaction may be pushed back into or may fall back into ordinary criminal courts of the old type * * *." [POUND, *The Juvenile Court and the Law*, in 10 Crime & Delinquency 490, 503 (1964)].

**(8)**

Although our argument assumes that proof beyond a reasonable doubt is a due process requirement in a criminal trial, it is not entirely clear that this is so. The reasonable doubt formula, it appears, was not used until the end of the 18th century and was applied at first only in capital cases. 9 WIGMORE, *Evidence* (3rd Ed., 1940), § 2497; MCCORMICK, *Evidence* (1954), § 321. Unquestionably it is applied in criminal proceedings in all the states; it is a "settled standard of the criminal law." *Holland* v. *United States*, 348 U.S. 121, 138 (1954).

It is true that Justice Frankfurter, in a dissenting opinion in *Leland* v. *Oregon*, 343 U.S. 790, 802-803 (1952), stated that due process required that guilt be established by this standard, but we have found no square decision or even clear dictum by this Court to that effect. At most we find statements, such as that in *Speiser* v. *Randall*, 357 U.S. 513 (1958), which say that (p. 526):

> "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt."

There are cases in which this Court has reversed a criminal conviction on due process grounds because there was no evidence of guilt to support it. *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961). Yet there does not appear to be any case of a reversal by this Court on the ground that the evidence was insufficient to show guilt beyond a reasonable doubt.

Cases involving real questions of constitutional import are treated in a markedly different fashion. For example, when confronted with a claim that a book is or is not obscene or that a confession is or is not coerced, this Court does not limit its function to a determination that there is some evidence or even that there is adequate or sufficient evidence to support the finding that the confession was voluntary or that the book was obscene. On the contrary, the Court denies that it is at all bound by the jury's conclusions. It regards itself as obligated to make its own independent evaluation of the record in determining whether these particular constitutional rights have been violated. *Jacobellis* v. *Ohio*, 378 U.S. 184, 187-190 (1964); *Haynes* v. *Washington*, 373 U.S. 503, 515-516 (1963). And this holds even if the jury has been meticulously instructed on the law of confessions or the law of obscenity.

The reason for this approach is evident. Whether or not the will has been overborne so as to culminate in a confession is a factual question. But, because a man has a constitutional right not to be coerced, the Court will reach its own determination, notwithstanding the judgment of the jurors. The degree of pruriency expressed in a book would also seem to be a question capable of final resolution by

the fact finders. The demands of free expression, however, require the Court to rely on its own judgment.

No similar independent evaluation of the record is made to determine whether guilt has been proved beyond a reasonable doubt. As the Court has held, the 14th Amendment does not provide for review of mere error in jury verdicts. *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944). On the other hand, the Court holds that such a review is required where it is claimed that constitutional rights have been impinged. Thus, if there truly were a constitutional right not to be convicted unless guilt has been proved beyond a reasonable doubt, there would seem no basis for providing a lesser mode of review than that used when other claims of due process violations are raised.

At page 13 of his brief the appellant appears to suggest that the presumption of innocence and the reasonable doubt standard are essentially equivalent. The difference between the two is clearly pointed out in *Coffin* v. *United States*, 156 U.S. 432, 460-461 (1895); and, although the statement therein that the presumption is the equivalent of evidence has been deprecated, this does not reflect on the validity of the distinction drawn by the Court. 9 WIGMORE, *Evidence* (3rd Ed., 1940), § 2511.

**d. The effect of a declaration of unconstitutionality based on the ground that a juvenile delinquency proceeding is equivalent to a criminal trial.**

**(1)**

A change in standard of proof in juvenile delinquency proceedings from the preponderance of evidence to proof beyond a reasonable doubt might well turn out to make little difference in the results of such proceedings. Theoretically there may be a substantial difference between the two measures of proof. And in a jury case the difference

is likely to be meaningful. It is far from clear, however, that this is so in a juvenile proceeding tried by an experienced and conscientious judge. It seems improbable that such a judge would reach a conclusion that a child is guilty of a wrongful act, with the potential of commitment as a result, unless he is fully convinced of his guilt. Several juvenile judges, to our limited knowledge, have stated that they never make such a finding in the absence of proof which is equivalent to that required in a criminal case.

Thus, the chances are that a prospective change in the quantum of proof required will not have a serious impact on the juvenile court in New York. A change which would apply retrospectively, however, would be extremely disruptive. A court which, despite increases in the number of its judges, has difficulty in keeping up with its calendars will be faced with the problem of retrying innumerable cases as well as dealing with the current calendar.

**(2)**

A declaration of unconstitutionality on the ground that the juvenile proceeding is equivalent to an adult criminal trial is, in addition, likely to have an even more serious impact. Such a determination may be regarded by this Court as almost automatically calling for other steps.

In light of *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Bloom* v. *Illinois*, 391 U. S. 194 (1968), it might be concluded that jury trials are required since a juvenile faces the potentiality of confinement for more than two years. This, in our opinion, would completely alter the nature of the juvenile court in New York. See *Task Force Report*, p. 38. Instead of a juvenile court which conforms to the aims of its innovators, albeit somewhat modified and at times falteringly, it would become a more benevolent criminal court. A jury trial is usually more combative

than a trial before a judge. The judge presiding with a jury would have far less opportunity to give the child a feeling that he is the object of the state's care and solicitude. An attempt to do so might mislead the jury into thinking that he was expressing his view concerning the factual question before the jury. Secrecy would, to a large extent, disappear. Obviously, a pledge of secrecy by twelve members of a jury cannot be enforced.

A decision that the quantum of proof and the procedures in a juvenile delinquency proceeding must conform to that in an adult criminal trial might affect other aspects of the jurisdiction of the New York Family Court. In addition to juvenile delinquency proceedings the court handles matters involving "persons in need of supervision." Such persons are any male under sixteen years of age and female under eighteen "who is a habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parents or other lawful authority" (Family Court Act, § 712). The court, on its own motion, may substitute such a proceeding for a petition to determine delinquency (*id.*, § 716). Often the supervision proceeding is used even though the petition alleges an act which, if done by an adult, would constitute a crime (*Judicial Conference—14th Annual Report*, pp. 255-256). Under this proceeding there cannot be an order of commitment but the children can be placed in the custody of an "authorized agency" or a "Youth Opportunity Center" for an initial period of 18 months, subject to successive extensions for additional periods of one year each (Family Court Act, § 756).

It could, therefore, be argued with some force that such a proceeding is sufficiently analogous to a juvenile delinquency proceeding as to require the application of adult criminal standards also.

**e. The possibility of confinement does not make use of the reasonable doubt standard a constitutional requirement.**

We are aware of no decision by this Court which has held that the reasonable doubt standard of proof is constitutionally required in a proceeding which may lead to confinement. Even dicta to that effect appears to have been expressed, with possibly a rare exception, only in criminal cases.

Should it be held that proof beyond a reasonable doubt is a constitutionally compelled standard in juvenile proceedings on the basis of a conclusion that such a standard is required in any instance of governmentally compelled loss of liberty or confinement, the impact would be even more widespread.

Since children may be confined as a result of "persons in need of supervision" proceedings, presumably the criminal standard of proof would become applicable. It might even be applied to neglect proceedings under which children who are seriously neglected or abused by their parents may be taken from them and placed with relatives, a "duly authorized" agency or in an institution. (Family Court Act, §§ 311-374, 611-634). This apparently would be true in a number of other situations where presently the proof beyond a reasonable doubt standard is not generally applied. Some examples follow:

1. Confinement because of insanity. See 29 Am. Jur., *Insane Persons*, § 146.

2. Confinement for chronic alcoholism. E.g., N.Y. Mental Hygiene Law, § 307.

3. Confinement of sexual psychopaths. See Note, 24 A.L.R. 2d 350.

4. Confinement of narcotic addicts. See *People* v. *Fuller*, 24 N Y 2d 292, 304, 248 N.E. 2d 17, 22 (1969); *People* v. *Moore*, 69 Cal. 2d 674, 72 Cal. Rptr. 800, 446 P. 2d 800, 807 (1968). Cf. *Robinson* v. *California*, 370 U.S. 660 (1962).

5. Civil contempt commitment. See Note, 49 A.L.R. 975, 978.

## POINT II

**The application of a standard of proof in juvenile delinquency proceedings which differs from that applied in adult or youthful offender criminal cases does not constitute a denial of equal protection of the laws.**

The appellant argues that it is a denial of the equal protection of the laws to apply the preponderance of evidence standard to juvenile delinquency proceedings while affording the proof beyond a reasonable doubt standard in adult and "youthful offender" criminal trials.

The argument, however, disregards the basic rule that there is no denial of equal protection where the applicability of different provisions of law rest upon a reasonable classification. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Ohio* v. *Akron Park District*, 281 U.S. 74, 81 (1930); *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584 (1935); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488-489 (1955). It is sufficient that a reasonable basis for the distinction, even though not enunciated, can be conceived as a basis for the legislative action. *Rast* v. *Van Deman & Lewis*, 240 U.S. 342, 357 (1916); *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940).

This rule is applied to legislation which relates to criminal proceedings as well as to civil matters. *McGowan* v. *Maryland*, 366 U.S. 420, 425-426 (1961); *Salsburg* v. *Mary-*

*land*, 346 U.S. 545 (1954); *Graham* v. *West Virginia*, 224 U.S. 616, 630 (1912); *Watson* v. *Maryland*, 218 U.S. 173, 178 (1910); *Missouri* v. *Lewis*, 101 U.S. 22, 31-32 (1879).

Here there is a more than ample reasonable basis for the distinction drawn. The statute provides that the adjudication in the juvenile delinquency proceeding may not be denominated a conviction and that the juvenile delinquent may not be denominated a criminal by reason of the adjudication. It also provides that no adjudication shall operate as a forfeiture of any right or privilege or disqualify any person from subsequently holding public office or receiving any license granted by public authority. It provides for the secrecy of the proceedings and strictly limits the use of records of the proceedings in other courts and the use of police records.

The intake procedures, which often dispose of a matter despite a wrongful act, differ sharply from criminal proceedings. Provision is made for unusually speedy action throughout the proceeding. There is also a great difference between the dispositional procedure in the juvenile proceeding and the sentencing procedure in criminal cases. Notwithstanding the commission of criminal acts, no juvenile may be adjudicated a delinquent until it is demonstrated at a dispositional hearing by a preponderance of the evidence that he requires supervision, confinement and treatment. Absent such proof, the petition must be dismissed. A similar result is impossible in the criminal law. Even where the adult receives a suspended sentence, the indictment and conviction stand and he remains branded a criminal.

Hence, it can be said that the juvenile enjoys a substantial benefit denied to the adult offender since the fact-finding hearing does not stand in the same relation to an ultimate adjudication and confinement as does the criminal trial.

New York, therefore, meets the test posed by this Court in *Kent* v. *United States,* 383 U.S. 541, 551-552 (1966), as to whether there is "any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as *parens patriae* evidencing * * * special solicitude for juveniles * * *."

In sum, what we have in New York, is a frank recognition that when dealing with children no intervention of any sort on the part of the State is justified unless a need for such intervention is demonstrated by adequate proof. If the proof fails, the State's interest ceases. PAULSEN, *The New York Family Court Act*, 12 Buff. L. Rev. 420, 437 (1963). No adult criminal is so protected. In short, the protection afforded the juvenile in New York in the resolution of the question of whether he should be deprived of his freedom is not equal to that given the adult; it is in many ways greater.

**(2)**

The appellant cites *Baxstrom* v. *Herold,* 383 U.S. 107 (1966) (App. Br., pp. 25, 28). There a jury trial was provided for all persons who were being committed because of insanity except for persons being so committed at the expiration of a penal sentence. This Court, in rejecting a contention that the classification was justified by the proven criminal tendencies of the allegedly insane prisoners, pointed out that the capriciousness of the classification was clearly revealed by the fact that the exception for prisoners was not applicable to persons with a past criminal record who were not in prison at the time of the institution of civil commitment proceedings (383 U.S. at pp. 114-115). The obvious absence of a rational basis for the classification has no parallel in the instant case.

The reliance by the appellant on the "youthful offender" procedure (N.Y.Code of Criminal Procedure, §§ 913-e to 913-r) seems equally unsound. It provides that the district attorney or a grand jury may recommend youthful offender treatment for youths between the ages of 16 and 19 who have committed a crime not punishable by death or life imprisonment and who have not previously been convicted of a felony (id., § 913-e, 913-g). The statute provides for a summary criminal trial without a jury, but an appellate court has held that a jury trial may be had as of right. *People* v. *Michael A.C. (Anonymous)*, 32 AD 2d 554, 300 N.Y.S.2d 816 (1969). There are some resemblances to the juvenile delinquency procedure in respect to secrecy and the effect of the adjudication, but in most other respects the Code of Criminal Procedure and the Penal Law govern. Surely the attempt to provide a procedure for some youths between the ages of 16 and 19 which is half way between that for juveniles and that for adult criminals should not make the differing procedures for juveniles a denial of equal protection.

The appellant also suggests that juveniles could be assisted without proof beyond a reasonable doubt under the "person in need of supervision" procedure (App. Br., p. 30). That procedure also provides for commitment. If appellant were successful in the present case and that procedure were then used for juveniles, the same attack would be made on it. And it would be difficult in defending such a case to distinguish it from the present one.

## CONCLUSION

**The appeal to this Court from the New York Court of Appeals should be affirmed.**

January 2, 1970.

Respectfully submitted,

J. Lee Rankin,
*Corporation Counsel of the City of New York,*
*Counsel for Appellee.*

Stanley Buchsbaum,
Vincent J. Syracuse,
*of Counsel.*